No. 3431.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY NUDELMAN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Oregon.

JOHN MANNING and ROSCOE C. NELSON, both of Portland, Oregon, Attorneys for Plaintiff in Error.

LESTER W. HUMPHREYS, United State Attorney for Oregon, and JOHN C. VEATCH, Assistant United States Attorney, both of Portland, Oregon, Attorneys for Defendant in Error.

LIST OF CASES CITED IN THIS BRIEF.

No. 3434.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY NUDELMAN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Oregon.

STATEMENT OF THE CASE.

The indictment against the defendant, Harry Nudelman, contains six counts. The first charges that the defendant did steal, carry away and conceal, with the intent to convert to his own use, certain rubber inner tubes for automobiles, from a certain railroad car numbered "G. T. 10457," which was at the time in the freight yards of the Oregon-Washington Railroad & Navigation Co., a common carrier, in Portland, Oregon. The said goods at the time being a part of an interstate shipment of freight from a factory at Detroit, Michigan, to the United States Rubber Company at Portland, Oregon, over the lines of the aforesaid Railroad Company and connecting carriers to the grand jurors unknown, and such goods being in the custody and control of the said Railroad Company. The other five counts each charge that the defendant unlawfully had in his possession various portions of the same goods alleged to have been stolen by the defendant in the first count; and further alleges that the defendant knew them to have been stolen, and that the said goods were a part of an interstate shipment of freight from the aforesaid consignor to the aforesaid consignee over the lines of the said Railroad Company. There is no allegation in any of these last five counts, charging that the said goods had been stolen while in interstate commerce (Trans. pp. 5 to 10).

The defendant was convicted after a trial upon all of the said counts, and was thereafter sentenced upon the verdict to thirteen months imprisonment in the Penitentiary (Trans. pp. 13 and 14).

At the opening of the case the Court denied a motion of the defendant to require the Government to elect whether it would prosecute the defendant for stealing the goods, or for having them in his possession, knowing them to be stolen, but the motion was denied. Thereafter evidence was offered by the Government tending to show that certain goods of the description alleged in Count One, were shipped by the aforesaid consignor to the United States Rubber Company at Portland, Oregon, and arrived in Portland on October 2nd, 1918; that at the time the defendant was a driver for the said consignee, in charge of its cartage, and was the duly authorized agent of the said Company to obtain from all freight and express depots all packages of freight or express which were consigned to the Company, and was authorized to take and receive for the Company any and all shipments consigned to it, which it was his duty to bring to the Company's warehouse (Transcript, page 41); that in the usual course of business, the teamsters taking goods from the freight house where the goods in question were stored, would get a delivery ticket from the office, back their vehicles to the pile where the goods were stored and get a checker to

check the boxes out to them; that the goods, while in interstate commerce, were not in the custody of the Oregon-Washington Railroad & Navigation Company, but in the custody of the United States Railroad Administration; that the goods mentioned in the indictment were not stolen from the car described in the indictment, but were removed by a certain railroad employee in the course of his work from the car to the freight house, in the space alloted to the United States Rubber Company. (Transcript, page 44).

Further evidence was offered tending to prove that on October 3rd, 1918, the defendant presented to the station warehouse foreman a delivery receipt for the goods in question, but the delivery clerk was unable to find same; and that on the 9th of October the defendant stated that he had not seen the goods. Evidence was then offered tending to show that the defendant had thereafter sold various inner tubes in cartons of the United States Rubber Company, to a large number of dealers in Portland, of the number and size corresponding to the goods alleged to have been stolen, at a materially reduced price (Trans. pg. 45).

At the close of the evidence the defendant also called the Court's attention to the fact that the indictment, or any count thereof, did not state a crime, but the defendant's contentions in this behalf were overruled. (Transcript, page 54). A motion

was also made to dismiss the case upon the ground that there had been a failure to identify the tubes shown to have been in the possession of the Railroad Company, as being the identical tubes which the proof tended to show were afterward sold by the defendant. But this motion was over-ruled. (Transcript, page 59).

At the close of the case the defendant also requested the Court to direct a verdict of not guilty, on the ground that there was a fatal variance between the indictment and proof in this respect; that the indictment alleged that the goods in question were stolen from a certain railroad car, and that the goods were in the custody of the Oregon-Washington Railroad & Navigation Co., whereas it appeared in the evidence, without contradiction, that the goods were removed from the said car by the employees of the Railroad and placed in the freight sheds of the said Railroad for delivery to the consignee; and it further appeared that the goods were never at any time in the custody of the Oregon-Washington Railroad & Navigation Co., but were in the custody of the United States Railroad Administration. But the said motion was overruled. (Transcript, page 58).

The defendant also requested the Court to instruct the jury that if it found from the evidence that the goods were removed from the freight house by the defendant, and that at said time the

defendant was the duly authorized agent and representative of the consignee of the goods, that it was the duty of the jury to acquit. This instruction being requested on the theory that as the evidence tended to show that the defendant was the agent of the consignee to obtain goods from the freight depot, he could not be guilty of larceny of the same; but this requested instruction was not given, except in a modified form inconsistent with defendant's theory. (Transcript, pages 61 and 71).

Instructions were given by the Court inconsistent with the defendant's contentions, above outlined, to which the defendant duly excepted. These are fully and definitely referred to in the Specifications of Error, and Argument.

The above, we believe, is a sufficient statement of the nature of the case and the errors complained of by the plaintiff in error.

SPECIFICATIONS OF ERROR AND ARGUMENT.

I.

The Defendant could not be guilty of stealing property and at the same time be guilty of receiving such stolen property, knowing it to have been stolen.

When the first witness for the Government was

put on the stand, the defendant, by his counsel, moved the Court for an order requiring the Government to elect whether it would prosecute the defendant for the theft of the goods as charged in Count One, or for receiving them, knowing them to have been stolen, as charged in the other counts of the indictment. This motion was over-ruled. (Trans., page 40, Assignment I). It was conceded by the United States Attorney that the goods described in the first count were the same as the goods described in the other counts. (Transcript, page 53).

At the conclusion of the testimony, the defendant again moved the Court to require the United States to elect whether it would proceed against the defendant upon Count One, charging the theft of the goods, or upon the counts charging him with receiving the goods, knowing them to have been stolen, which motion the Court over-ruled. (Trans., page 53, Assignment IV).

The defendant requested the following instructions, which were denied:

> "If the jury finds from the evidence that the defendant stole, carried away or concealed the goods described in the indictment with intent on his part to convert the same to his own use, and that the goods described in Count One of the Indictment are the same and identical

goods described in Counts two, three, four, five and six of the indictment, then the jury are instructed to acquit the defendant as to Counts two, three, four, five and six."

"That unless the jury finds from the evidence that the goods described in Counts two, three, four, five and six of the indictment are different goods from those described in Count one thereof, then the jury must acquit the defendant as to Counts two, three, four, five and six, provided they find from the evidence that the defendant stole the goods described in Count one."

"Under the indictment and evidence in this case, the defendant cannot be convicted by the jury of both the crime of stealing the goods and with having them in his possession knowing them to be stolen. If the jury finds from the evidence that the defendant stole the goods, then they must acquit the defendant as to the other counts of the indictment."

(Trans., page 60, Assignments XI, XII and XIII.)

The Court instructed the jury on this point as follows:

* * * "As a person cannot steal and carry away the goods without having them in his possession, with knowledge of the theft, he may be

guilty of both offenses, they arising out of the same series of acts. Now, it was proper for the Government to indict for both offenses, but the charge for each offense must be a separate count, and that is what has been done here. While, if the evidence warrants, the defendant may be convicted on two or more of these counts, including the first, but one punishment can be meted out, and that is for the Court and not for the jury. So that while a defendant charged with several offenses arising out of the same acts or series of acts may be convicted of more than one of such offenses, he can only receive one punishment, which will discharge him of all the offenses."

"You may convict upon one or more, or all the counts, or acquit upon one or more, or all the counts." * * * *

(Trans., pages 65 and 66, Assignments XV, XVI, XVII, XVIII and XIX).

We believe the Court erred to the prejudice of the defendant in allowing the said indictment to go to the jury on all of the counts, and that the Court should have required the Government to elect whether it would proceed upon the first count, or the other five counts.

In the case of Halligan vs. Wayne, 179 Fed., 112, (9th Cir.), which was a habeas corpus proceeding,

it appeared that Wayne had been convicted of burglary of a post office, and also of larceny of certain postage stamps from the said post office. Wayne was convicted on both counts, given a sentence as to each count. The Appellate Court held that there could be but one conviction, and in approving the law as stated in 3 Enc. of Pl. & Pr., 785 and 791, said:

> "But the verdict and the conviction in such a case cannot be for both the burglary and the larceny, though they may be for either offense singly. When both offenses are united in one indictment, it is permissible to convict for either offense without the other."
>
> "But there cannot be a conviction for both offenses. There may, however, under such an indictment, be found a general verdict of guilty; but on this verdict there can be but one sentence, that for the burglary alone, and not for both burglary and larceny."

To the same effect was Stevens vs. McClaughry, 207 Fed. 19; and Munson vs. McClaughry, 198 Fed. 72.

In the matter of Hans Neilson, 131 U. S. 176, the Supreme Court held that an indictment for unlawful co-habitation was a bar to a prosecution for adultery during a period covered by the indictment.

"One can not be at the same time a thief and a receiver of the stolen property."

25 Cyc. 59.

State vs. Honig, 78 Mo. 249.

State vs. Larkin, 49 N. H. 39.

We realize that it is ordinarily within the discretion of the Court to require the prosecutor to elect between offenses, but in this case where it plainly appears that the defendant could not be guilty of both the crime of stealing certain property and receiving the same, knowing it to have been stolen, and the matter was called to the attention of the Court at the proper time before any evidence was introduced by the Government, the Court should have required the Government to elect which crime it would proceed upon. The Court's failure so to do deprived defendant of a substantial right.

II.

The Indictment Does Not State a Crime.

Assignments V, IX, XV, XVI and XIX.

At the conclusion of the testimony the defendant moved the Court to dismiss the indictment against the defendant for the reason that the same did not state facts sufficient to constitute a crime against the defendant. As to Count One of the Indictment, it was urged that the indictment was fatally defic-

ient in that as to the goods alleged to have been stolen, the indictment did not name or describe the owner, bailee or custodian of said goods. As to the other counts it was urged that each of them failed to allege that the goods in question were, when stolen, in interstate commerce; and further that the indictment does not allege that said goods were stolen from any railroad car, warehouse, station house, platform, depot, steamboat or vessel of any common carrier; and further, because each of said counts do not describe or name the owner, bailee or custodian of the said goods sufficient to identify them. This motion was over-ruled. (Trans., pages 54-57, Assignment V.)

The defendant also moved the Court to instruct the jury to find the defendant not guilty upon each of the said counts, which motion was over-ruled. (Trans., page 59, Assignment IX.)

Exception was also taken to the instructions of the Court to the jury, in which the Court stated that said counts were sufficient. (Trans., pages 64, 65 and 66, Assignments XV, XVI and XIX.)

An indictment or information for larceny, which contains no allegation of the ownership of the stolen property, is subject to a demurrer. The defect is not cured by a verdict, and the motion for arrest of judgment should be sustained.

18 Standard Proc. 758.

In the case of People vs. Hanselman, 76 Calif., 460; 9 Am. St. Rep. 238, the Court said:

> "And under all definitions of larceny found in the books, the ownership of the property averred to have been stolen in some other person than the one charged with stealing it is an essential element of the crime. The code of this state provides that it must be the property 'of another.' And all the authorities are concurrent to the point that this essential part of the crime must be stated in the indictment: 2 Archbold's Criminal Law, 357 et seq.; 2 Russell on Crimes, 107. To disregard this firmly fixed and universal rule, in order to condone the faultiness of the information in this case, would be to commit an act of judicial usurpation."

As shown above, Counts Two to Six, inclusive, of the indictment contain no allegation that the goods received by the defendant had been stolen while in interstate commerce, or were stolen from any of the places enumerated in the statute. This is a vitally essential allegation and without it the Federal Courts could not have jurisdiction. These counts of the indictment do not go further than to simply allege that the defendant received certain stolen goods, which were in interstate commerce, but do not show that they were stolen while in such interstate commerce.

For these reasons we believe that the Court, upon the request of the defendant, should have granted the motion of the defendant to dismiss the indictment, and that its failure to do so was error prejudicial to the defendant.

III.

There was a fatal variance between the allegations of the indictment and the proof.

Assignments VI, X, XX, XXII, XXIII, XXVII and XXVIII.

Count One of the indictment alleged that the goods were stolen from a railroad car, to-wit: a car initialed and numbered "G. T. 10457," which was at the time in the freight yards of the Oregon-Washington Railroad & Navigation Co., a common carrier, in Portland, Oregon, and that the goods at the time of being stolen were in the custody and control of the Oregon-Washington Railroad & Navigation Co. (Trans., pages 6-10.)

The evidence offered by the Government tended to show that the goods were taken by the defendant from the warehouse of the United States Railroad Administration at Portland. There was no evidence tending to show that the defendant had stolen the goods from the said railroad car, or that the goods were ever in the possession, custody or control of

the Oregon-Washington Railroad & Navigation Co. (Trans., pages 42-44, 50-52.)

At the close of the evidence the defendant moved the Court to instruct the jury to find the defendant not guilty, because of the variance between the indictment and proof as above stated. But said motion was denied. (Trans., page 58, Assignments VI and X.)

The Court instructed the jury as follows:

> "Now, there is some question made here as to whether the indictment is sufficient in charging that these goods were taken from car No. 10457. The evidence tends to show that the Railroad Company itself had taken the goods out of the car and placed them in its freight warehouse, ready for delivery to the consignee. I instruct you, gentlemen of the jury, that it makes no difference whether the goods were in the car at the time they were taken, if they were taken by the defendant, or whether they were in the freight warehouse and not yet delivered to the consignee."
>
> "Another question has been made here, and that is with reference to whether the Oregon-Washington Railroad & Navigation Co. was in the operation of its roads while these goods were being transported. The fact is that the Government was at the time in the operation

> of such railroad lines. It had prior to that time, under the authority of a law of Congress, taken over this line, with a great many others, and was operating the lines for the purpose of the Government. But I instruct you that it makes no difference in this case whether this railroad was being operated by the corporation of the Oregon-Washington Railroad & Navigation Co. itself, or was being operated by the Government. The material thing in the case is, were these goods being transported at the time from the warehouse before delivery to the consignee, then the defendant would be liable if he stole them, if he took them surreptitiously from such warehouse."

to which instructions the defendant duly excepted. (Trans., pages 70-71, Assignments XXII and XXIII.)

The said variance above referred to was also urged upon the Court by the defendant in his motion for a new trial, and motion in arrest of judgment, both of which motions were over-ruled. (Trans., pages 76-80, Assignments XXVII and XXVIII.)

We believe that this constitutes a material and fatal variance and the Court erred in allowing the case to go to the jury as these essential allegations of the indictment were not proven.

We have contended that the indictment is not

sufficient, in that there is no allegation of ownership of the goods in question in the indictment. Conceding, for the purpose of the argument of the question now discussed, the sufficiency of the indictment in this respect, the only possible allegation of ownership would be the allegation that the goods were in the custody and control of the Oregon-Washington Railroad & Navigation Co.

Wharton, in his comprehensible work on criminal law, says:

> "To sustain an indictment for larceny, the goods alleged to have been stolen must be proved to be either the absolute or especial property of the alleged owner, provided that such owner be not technically the defendant."
>
> 2 Wharton's Crim. Law 1394 (11th Ed.).
>
> "The property of the stolen goods must be in the rightful owner, general or especial: If the owner be misnamed; if the name thus stated be not either his real name or the name by which he is usually known; or if it appear that the owner of the goods is another and different person from the person named as such in the indictment, the variance will be fatal and the defendant, at common law, must be acquitted."
>
> 2 Wharton's Crim. Law 1398 (11th Ed.).

In the Standard Ency. of Evidence, Vol. 13, page 715, on the subject of variance, it is stated:

> "Allegations of an indictment, descriptive of the ownership and character of the property, must be proved as charged."

In 25 Cyc., page 84, subject Larceny, the rule is stated:

> "If the place of the commission of an offense enters into and is material for the description of the offense, it must be exactly alleged and proved."

The case of **Johnson vs. State, 111 Ala., 66,** illustrates our contention. The defendant was indicted for burglary upon the charge that he broke into a railroad car, the property of the Alabama Mineral Railroad Co. The proof tended to show that the railroad car was standing upon a track in the possession of the Alabama Mineral Railroad Co., but was the property of the Louisville & Nashville Railroad Co. The Court held upon writ of error that this was a fatal variance and reversed the case.

Moynhan vs. People, 3 Colo., 367, was a homicide case wherein the indictment alleged the name of the deceased to be Patrick Fitz Patrick, and the proof showed the name of the deceased to be Patrick Fitzpatrick. The Court held this variance to

be fatal. The Court in its opinion said, at pages 373-374:

> "It follows, therefore, that the indictment failed of its office. It afforded the prisoner no information as to the person with whose death he is charged. If the result had been favorable to him he could not have availed himself of this record to bar another indictment, without producing evidence **aliunde** to identify the person named as the murdered man, in the new indictment, with the person who appears in that character in the present one; a burden, which neither the grand jury, nor the prosecutor, nor the courts have any power to impose.
>
> It will not suffice to say that the prisoner has not been misled. In the present state of the law we are not permitted to say this. It is presumed that every accused person is both innocent and ignorant of the offense alleged in all its substance and detail; and, therefore, it is that the law requires a specific charge of the whole matter, with all its particulars."

An averment of a sum of money obtained by false pretense is not supported by proof of obtaining a Certificate of Deposit of a bank.

> Commonwealth vs. Howe, 132 Mass. 250 at 258.

The case of **Commonwealth vs. Stone, 152 Mass.** 498, is also illustrative of our contention. In this case the residence of a person, whose testimony was suborned, was not proved as alleged in the indictment. The Court said, at page 499:

> "It has been held that where a person necessarily mentioned in an indictment is erroneous-described as George E. Allen instead of George Allen, or Nathan S. Hoard instead of Nathan Hoard, or the Boston and Worcester Railroad Company instead of the Boston and Worcester Railroad Corporation, the variance is fatal, unless it shall be shown that the person so named is known by the one name as well as the other, as the correct description of such person is necessary to identify the offense. Commonwealth v. Shearman, 11 Cush. 546. Commonwealth v. Pope, 12 Cush. 272. Commonwealth v. McAvoy, 16 Gray, 235. Where a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, the circumstances of the description are to be proved, as they are made essential to its identity. Thus, in an indictment for stealing a horse, its color need not be mentioned; but if it is stated, it is made descriptive of the animal, and a variance in the proof of its color is fatal. 1 Greenl. Ev. Sec. 65. 3 Stark. Ev. (4th Am. Ed.) 1530. Commonwealth v. Wellington,

7 Allen, 299. State v. Noble, 15 Maine, 476. Rex v. Raven, Russ. & Ry. 14."

In **Davis vs. People, 19 Ill.,** 73, a homicide case wherein the indictment alleged the name of the deceased to be Seth Taylor and the proof only showed that a man named Taylor was murdered, there was held to be a fatal variance.

In **State vs. Crogan,** 8 **Iowa** 523, the indictment charged the defendant with occupying a certain building on a certain described lot, for gambling purposes. The Court refused a requested instruction that the situation of the premises must be proved as alleged, and if not thus proven, the jury must acquit. The appellate court in holding that such instruction should have been given said:

> "In some instances, where the place is stated in the indictment as a matter of local description, and not as venue, it is necessary to prove it as laid, although it need not have been stated; and the case before us is one of this class. Roscoe's Cr. Ev., 110-11; Wharton's Cr. Law, 280; People v. Slater, 5 Hill, 401; same v. Honeyman, 3 Denio, 121; Shaw v. Wrigley, 2 East., 500; 2 Stark. Ev., 1571; 2 Russ., 800-1."

Hamilton vs. State, 60 Ind. 193; 28 Am. Rep. 653.

State vs. Sherburne, 59 N. H. 99.

We believe that the variances herein complained of are not of a formal nature such as come within the provisions of Section 1025 U. S. R. S. The allegation as to the place from where the goods were stolen was essential to the description of the offense. The allegation of the custody of the goods was also an essential averment. There was a variance between the allegation and the proof in both cases. Inasmuch as the law clothed the defendant with the presumption of innocence, as said in the case of **Monyhan vs. People** above cited, he is presumed not only to be innocent but to be ignorant of the offense in all its details. If it appears that the proof does not conform to the allegations in these two important details of the crime charged, it can not be said that he was not misled where the indictment informed him that he is to be charged with stealing from a railroad car in the custody of the Oregon-Washington Railroad & Navigation Co., and the proof shows that such is not the fact.

IV.

There was no proof sufficient to go to the jury showing that the tubes in the possession of the defendant were the same tubes as those claimed to have been stolen.

Assignments VII and VIII.

The indictment alleged the theft of 72 rubber

inner tubes for automobile tires, of three different sizes. (Trans., page 5.) The proof showed that a consignment of goods to the United States Rubber Co. of this description was unloaded at Portland, Oregon, from the car on October 2nd, 1918, by railroad employees, and placed in the warehouse at Portland in a pile; and also that the defendant was a teamster for the consignee and accustomed to go to the warehouse to obtain freight for his employer. (Trans., pages 42 and 43.) On October 3rd, 1918, the defendant presented to the warehouse foreman a delivery receipt for the goods in question, but the clerk was unable to find the goods, and on October 9th, 1918, asked the defendant whether he had seen the goods, and the defendant replied he had not. (Trans., page 43.) On October 2nd, 1918, the defendant received two shipments for the United States Rubber Co., and the railroad employee took his delivery tickets for same. (Trans., page 43.)

In November or December, 1918, a special officer of the Railroad Administration inquired of the defendant concerning this shipment of tubes, and the defendant said he knew nothing about it. (Trans., page 45.)

Evidence was also offered tending to prove that the defendant had taken a box approximately three feet in size, from the Portland Transfer & Storage

Co. and had sold inner tubes in cartons of the United States Rubber Co. to various garage men and retail tire dealers in Portland, of the number and size corresponding to the shipment alleged to have been stolen, at a price materially lower than the price at which they were sold by the United States Rubber Co. (Trans., page 45.)

The United States Rubber Co. was the sole distributor of these tubes in Portland, but approximately 100 dealers in that city had these tubes for sale at retail, and the tubes were kept in cartons and were not identified by any number placed thereon. (Trans., page 41.)

A witness named Hyman Cohen, testified that on December 2nd, 1918, the defendant offered to sell him inner tubes of the kind sold by the United States Rubber Co.; that the defendant turned over to him a box approximately three feet square, containing 72 inner tubes, and that defendant got this box from the Portland Transfer & Storage Co. That witness was unable to sell the tubes and returned them to defendant; that witness paid $162.50 to the defendant, who, upon return of the tubes, paid back the money; that defendant told him that these tubes were seconds and he purchased them from the United States Rubber Co. That witness has received a letter from defendant in which defendant desired him to specify and say

that witness had purchased the goods from a man named I. Davie. (Trans., pages 45-46.)

This was all the evidence tending to connect the defendant with the theft of these tubes.

At the close of the case the defendant moved to dismiss the case because there had been a failure to identify the tubes themselves as a part of the shipment; that there was no showing that the case was stolen, and the evidence so far revealed was consistent with the position that the case, which was alleged to have been stolen, had subsequently been found by the Railroad Administration. (Trans., page 59, Assignments VII and VIII.)

In order to invoke the presumption of guilt, from the possession of property alleged to have been stolen, the property found in the possession of the defendant must be identified as the property which was stolen.

8 Stand. Ency. of Ev. 105.

In the case of State vs. Payne, 6 Wash. 563; 34 Pac. 317, the Court said:

> "Until the property found in the possession of the defendant has been identified as the property of the alleged owner, and as having been stolen, its possession calls for no explanation whatever. It is the possession of property shown to have been stolen that raises a

presumption of the guilt of the possessor, not a possession of like property merely."

In the case of Hamilton vs. State, 60 Ind. 193; 28 Am. Rep. 653, it was held that an indictment for larceny of "Lawful money of the United States" is not supported by proof of the larceny of money merely; inasmuch as a large proportion of the circulating medium are national bank notes, which are in no sense money of the United States, and the evidence did not show that the money stolen did not consist of such bank notes.

In the case of Kaiser vs. State, 35 Neb. 704, the Court said, at page 706:

"The case, therefore, is this: Gallagher, while intoxicated, lost a sum of money. Soon thereafter the plaintiff in error is proven to have been in possession of a sum of money corresponding in kind to that lost by Gallagher, and under circumstances tending to show that he did not come by it honestly. Circumstantial evidence to warrant a conviction should be of such a convincing character as to prove beyond a reasonable doubt that the accused, and no other person, committed the crime with which he is charged. (Walbridge v. State, 13 Neb. 236; Bradshaw v. State, 17 Id. 147). Here, aside from the possession by the plaintiff in error of an unusual sum of money, there is no

proof whatever to connect him with the larceny, if we assume that the money was in fact stolen from Gallagher, an assumption not fully warranted by the evidence." * * * * "While the evidence was admissible as tending to establish the guilt of the accused, and while it may be said to raise a strong presumption that he did not come by the money honestly, it is certainly insufficient to exclude the theory of his innocence of the crime of larceny and to establish his guilt thereof beyond a reasonable doubt."

In State vs. Nesbit, 4 Idaho 548; 43 Pac. 66, which was a case in which the defendant was charged with the crime of larceny of a certain sum of money, the Court said, at page 556:

> "Conceding that there is circumstantial evidence against the defendant tending to establish his guilt, those circumstances can be and are as reasonably explained on other hypotheses than that of the defendant's guilt, or as perfectly consistent with defendant's innocence and for that reason a new trial should have been granted."

In this case the evidence tended to show that the defendant was in a building in which was a safe containing the money lost by one Frame, included in which was an English sovereign and a

$100.00 bill. Shortly thereafter the defendant was apprehended, and hidden in his clothing was a $100.00 bill and an English sovereign, and other money. The owner was unable to completely identify the $100.00 bill or the English sovereign. The Court held that this was insufficient, in the language as above stated.

In the case of State vs. Kube, 20 Wis. 217; 91 Am. Dec. 390, the indictment alleged that the defendant obtained by false pretenses, from an express agent, a package of money containing $60.00 in bank bills. The evidence did not very clearly show what the package contained, or that it contained bank bills. The Court held that the prosecutor was confined to proving that the package contained bank bills, and that for failure to do so the case must be reversed.

From the above cases it will be seen that the courts have held that mere possession of propesty of like character to that which has been alleged to have been stolen, is insufficient to convict, although it may be a suspicious circumstance; and that where circumstantial evidence is relied upon, it must exclude every other reasonable hypotheses consistent with the innocence of the defendant. In the case at bar there was no proof that the goods, which the testimony showed were sold by the defendant, were the same identical goods as

those alleged in the indictment to have been consigned to the United States Rubber Co.; nor was there any proof to exclude the presumption that the defendant could have bought or obtained the goods he sold from some place other than the warehouse of the United States Railroad Administration. For this reason we think the Court should have dismissed the case at the conclusion of the testimony, and directed a verdict to acquit, and that its failure to do so was prejudicial error.

V.

The defendant being authorized by the consignee to receive and take the goods in question from the carrier, could not be guilty of stealing such goods.

Assignments of Error XIV, XXIV, XXV and XXVI.

The manager of the United States Rubber Company, consignee of the good in question, testified that the defendant was the duly authorized agent of the United States Rubber Company to **obtain** from all freight and express depots all packages of freight or express which were consigned to the Company, and was authorized to take and receive from the Railroad Company any and all shipments consigned to the said Company, which it was his

duty to bring to the Company's warehouse. (Trans., page 41.)

A checker for the Railroad Company testified that the goods in question were unloaded at Portland, Oregon, from the car on October 2nd, 1918, by men, under his direction, and placed in the warehouse in a pile. (Transcript, page 42.)

The defendant came to the warehouse practically every day to get shipments for the United States Rubber Company, and was the only person who came down to the freight house for them, and was the man authorized to take and carry away all shipments consigned to said Company and that the employee of the Railroad Company accepted the defendant's receipts for all goods shiped to the United States Rubber Company. (Trans., page 44).

All of the above evidence was undisputed.

The defendant requested the Court to instruct the jury that if they found from the evidence that the goods were removed from the freight house by the defendant, and that at such time the defendant was the duly authorized agent and representative of the consignee of the goods, that it was the duty of the jury to acquit the defendant. Which instruction the Court refused to give. (Trans., page 61, Assignment XIV). However the Court did instruct the jury in effect that even if the defendant

was the authorized agent of the consignee, he would have no right to take the goods contrary to the rules of the Railroad Company, or by reason of his agency to take the goods without the consent of the Railroad Company, or to carry away the goods surreptitiously with intent to convert them to his own use. Transcript, pages 71-73). (Assignments XXIV, XXV and XXVI.)

The statute under which the defendant was indicted makes punishable the larceny of property in interstate commerce. The goods in question were consigned to the United States Rubber Company at Portland, Oregon, and were placed in the warehouse awaiting delivery to the said Company. The defendant was authorized by the said Company to take and receive all of their freight from the railroad depots. The minute he took the same, the goods ceased to be interstate commerce.

Larceny can not be committed, generally speaking, unless the taking is against the will of the owner; therefore, a taking by consent of the owner or possessor, although the taker had a felonious intent at the time of the taking, is not larceny.

25 Cyc., 38.

People vs. Proctor, 82 Pac., 551 (Cal. App.).

It has also been held that where a servant places goods in a receptacle provided by the master, not

in the course of the master's business but for his own convenience as a hiding place, and not intending to relinquish them to his master but to appropriate them to his own use, possession does not vest in the master and the servant afterwards taking the goods does not commit larceny.

25 Cyc. 28.

Com. vs. Ryan, 155 Mass. 523; 31 Am. St. Rep. 560.

The contention of the plaintiff in error on this point is that inasmuch as he was authorized by his employer to take all goods from the freight depot, consigned to his employer, he could not commit the crime of larceny in taking them, and that if after having taken them he conceived the idea of stealing the same, or even if he conceived the idea at the time of taking them, he would not be guilty of the said crime. There was evidence that it was the rule or general custom of the Railroad Company to require the party taking the freight to sign a receipt for same, and that usually the goods were checked out by an employee of the Railorad Company to the delivery man. We do not think that it can be successfully contended that the mere failure to sign a receipt, which is only evidence of the taking of the goods, or to conform to the rules of the Company, would make the defendant guilty of larceny. He was at all times authorized by the

consignee to take the goods from the Railroad Company. If he, after taking the goods, conceived the idea of defrauding his master of same, the crime would be one of embezzlement and a State and not a Federal offense.

The case of U. S. vs. Safford, 66 Fed. 942, we believe, supports our contention. In that case a youth was charged with embezzling a letter containing an article of value, which had been in the postoffice and had not been delivered to the addressee. The letter had been placed by the mail carrier upon the desk of the consignee's manager and from thence stolen by the defendant.

The Court in dismissing the indictment said:

> "Congress only intended to secure the sanctity of the mail while it was in the custody of the Postal Department enroute from the sender to the person to whom it was directed. Beyond the protection of the mail, while discharging the functions of postal service in respect to it, the Federal Government has no rightful power or legal concern. * * * * It would be reprehensible to assume that Congress made a pretext of this power to establish rules of good conduct and punish violations of them, between a principal and agent, or to promulgate police regulations independent of the postal service and after the postal

functions had been performed. Such matters are of local concern, amenable to State law."

In a similar case, U. S. vs. Driscoll, Federal Cases No. 14994, the Court said:

> "I think delivery means in this, as in the other, clause, delivery made to the person or his authorized agent. When such a delivery has been made, the Government is discharged of further responsibility, and its function ceases to operate upon the letter. If the clerk or servant of the owner betrays his trust, that is a matter to be looked into by the authorities of the State, whose laws regulate such agencies. If those laws make the act an embezzlement, there will be a remedy; if not, it would not be becoming in Congress to do so if it could—which may be doubted. These letters had been delivered to the persons to whom they were directed, because they had been delivered to a servant duly authorized by them to receive their letters."

It has been held in many other cases that where a letter has been left with any one for the addressee, and the party receiving it steals same, such stealing would not be a violation of the federal law.

U. S. vs. Lee, 90 Fed. 256.

U. S. vs. Huilsman, 94 Fed. 486.

We believe that the above cited cases are in

point, in that the defendant Nudelman being the authorized agent of the consignee to take the goods when he did take same, there would be a delivery to the consignee irrespective of the defendant's intentions with respect to the goods at the time of taking them, and such delivery would take the goods out of interstate commerce, and a theft of them from the consignee would be beyond the purview of the Federal statute.

We trust that we have fairly presented to the Court the several questions at issue. It is respectfully submitted that upon due consideration the judgment of the District Court should be reversed.

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